Supreme Court, U.S.
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No. 92-1284

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SUZAN E. TAYLOR d/b/a EXPLORATION SERVICES,
Petitioner,

V.

BANK ONE, TEXAS, N.A. and
FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for MBANK HOUSTON, N.A.
and THE DEPOSIT INSURANCE BRIDGE BANK, N.A.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY OF PETITIONER TO BRIEF IN OPPOSITION

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ARGUMENT

The FDIC, in its Brief in Opposition, never addressed the holding of the court of appeals regarding the jury's award of punitive and DTPA damages. The court below said, "Inasmuch as the punitive damages would operate against the United States, and there being no express Congressional waiver of sovereign immunity, ... the district court abused its discretion in denying the FDIC's motion for relief from judgment on this issue." Pet. App. A-40. This holding is so egregiously wrong that the FDIC understandably prefers to ignore it.

The words "sovereign immunity" never appear in the FDIC's brief, and the FDIC made no effort to support the decision below or to explain how, in its status as receiver, it is sovereign. The FDIC never denied that the trial court's judgment was against MBank Houston, N.A. ("MBank") and not against the FDIC in any capacity. And the FDIC never suggested that Taylor's recovery of punitive damages would interfere with public administration or impact the federal treasury. Instead, the FDIC argued, as a matter of policy, that a judgment for punitive damages should not be enforceable against the receivership estate if appeals are pending at the time of insolvency. That policy argument was neither discussed nor decided by the court below.

The FDIC's attempt to distance itself from the opinion below is consistent with the position it has taken since the verdict against MBank. Sovereign immunity was never even mentioned in the post-

verdict motions and was relegated to one sentence in the FDIC's appellate briefs.[1]

The FDIC's one reference to "immunity" in its Brief in Opposition was in the context of a policy discussion of "federal common law" whereby "the federal courts have declined to allow the imposition of punitive damages on federal receivers." Brief in Opposition at 5-6 (citing *FDIC v. Claycomb*, 945 F.2d 853, 861 (5th Cir. 1991); *Commerce Fed. Sav. Bank v. FDIC*, 872 F.2d 1240, 1247-48 (6th Cir. 1989); *Anderson v. Hershey*, 127 F.2d 884, 887 (6th Cir. 1942)). These cases, however, are wholly inapposite and will not support the decision of the court of appeals. Two of the three cases have nothing to do with the issue of sovereign immunity. *See Claycomb*, 945 F.2d 853; *Anderson*, 127 F.2d 884. The third case addresses the liability of the FDIC for its conduct in its corporate capacity -- a critical difference from this case where the FDIC was not sued for either its actions or its status as receiver. *See Commerce Fed. Sav. Bank*, 872 F.2d 1240. Additionally, in none of the cases involving punitive damages cited by the FDIC was the agency appointed as receiver after entry of judgment.

By contrast, in this case, the FDIC was appointed receiver twenty-nine days after a judgment had been entered against MBank for its wrongful conduct. The FDIC has cited no case holding that a judgment for punitive damages signed prior to the

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1. In light of the FDIC's refusal to argue sovereign immunity, it is absurd for that agency to suggest that Taylor has conceded the applicability of the defense. No such concession was made in Taylor's briefs or in the oral argument below..

appointment of a receiver must be set aside for the protection of other creditors of the receivership estate. The policy argument against punitive damages asserted by the FDIC simply has no support in the law.

Like any other receiver, the FDIC takes the receivership estate with the assets and liabilities that existed at the time of insolvency. *United States v. Knox*, 111 U.S. 784, 786-87 (1884); *FDIC v. Wright (In re Still)*, 963 F.2d 75, 77 (5th Cir. 1992); *American Nat'l Bank v. FDIC*, 710 F.2d 1528, 1540 (11th Cir. 1983); *FDIC v. Grella*, 553 F.2d 258, 262 (2d Cir. 1977). Taylor's judgment for punitive damages was a liability of MBank that burdened the estate assumed by the FDIC as receiver. The fact that the judgment was appealable at the time of MBank's insolvency is significant only because the receiver could contest the merits of the judgment while avoiding execution. The appealability of that judgment was not a reason to set it aside.

The FDIC also argues that section 1821(d)(13)(A) of 12 U.S.C.A. (West 1989) (and the prior rule that it codifies) would not bar the FDIC's "claim" in this case, because the defense was asserted before the time for appealing the judgment had passed. Brief in Opposition at 7-8. What the FDIC fails to make clear is that the defense that was interposed was not a sovereign immunity defense, but simply a policy argument that punitive damages are not available against the receiver of a failed institution. Accordingly, by the FDIC's own analysis, the FDIC is barred by section 1821 (and the prior rule that it codifies) from raising the sovereign immunity defense, and the decision of the court of appeals based upon that defense should be reversed.

The cases relating to the FDIC's right to raise its special D'Oench, Duhme[2] and section 1823(e)[3] defenses as a postjudgment intervenor do not support the FDIC's policy arguments that the receivership estate is not liable for a judgment for punitive damages signed prior to insolvency.[4] The right of the FDIC, as receiver, to raise its special defenses for the first time on appeal is limited to those cases in which the judgment was favorable to the bank. *See 5300 Memorial Investors, Ltd. v. RTC (In re 5300 Memorial Investors, Ltd.)*, 973 F.2d 1160, 1163-64 (5th Cir. 1992); *RTC v. McCrory*, 951 F.2d 68, 71 (5th Cir.), *cert. denied*, 113 S. Ct. 459 (1992). *But see In re 604 Columbus Ave. Realty Trust*, 968 F.2d 1332, 1342-44 (1st Cir. 1992). However the conflict between the circuits regarding the time for asserting the special defenses may be resolved, there is simply no authority to support the assertion by the FDIC that its appointment as receiver is, by itself, a reason to set aside a judgment for punitive damages signed before insolvency.

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2. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

3. 12 U.S.C.A. § 1823(e) (West 1989).

4. Of course, the issue raised by Taylor's Petition is not whether the FDIC, as a postjudgment intervenor, can raise its epecial defenses on appeal. The issue is, instead, whether the FDIC's status as a federal agency changes the rule that the net worth of the receivership estate is fixed as of the time the receiver is appointed subject to the receiver's right to litigate claims.

CONCLUSION

For the reasons set forth in the Petition for Certiorari and in this Brief, the award of punitive damages in favor of Suzan E. Taylor d/b/a Exploration Services should be reinstated.

Respectfully submitted,

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